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No. 84-389

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

W. HENSON MOORE, U.S. REPRESENTATIVE, SIXTH DISTRICT, LOUISIANA, *et al.*,

Petitioners,

v.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,

Respondants.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Reply Brief of Petitioners In Support of Certiorari

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The Court of Appeals held that congressional plaintiffs suffer a "distinct and palpable injury," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), when a constitutional defect in the legislative process deprives them of the opportunity to discharge constitutional obligations that properly belong to their office, and are within the "zone of interests," *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 475 (1982), created by the Origination Clause. See also, *Riegle v. Federal Open*

Market Committee, 656 F.2d 873 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 1082 (1981); *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979) (en banc), *vacated on other grounds*, 444 U.S. 996 (1979); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974). If this ruling is in error, as the Government's Brief states that it is, neither the Court of Appeals for the District of Columbia nor any other court will be able to learn of it by a mere denial of certiorari.

This case presently stands in the following posture: The United States Court of Appeals for the District of Columbia Circuit held that although this is a justiciable case or controversy over which courts of the United States concededly have subject matter jurisdiction, and although the petitioners presumptively bring a valid claim arising under the Constitution (Pet. App. A, at 6a), the case need not be decided for "equitable" reasons. The only question raised in this Court is whether the admittedly flexible powers of the federal courts can be said to go so far as to decline to adjudicate a matter properly before them. Such a doctrine does not exist outside the D.C. Circuit. It is well established in the D.C. Circuit. No conflict of circuits will likely occur because the questions to which the "equitable" discretion doctrine is applicable arise only at "the Seat of the Government of the United States." United States, Constitution Article 1, Section 8, Clause 17.

If the Government's standing argument is taken seriously, the legislative branch is completely at liberty to ignore the Origination Clause of the Constitution—and much else besides. Any legislative majority sufficient to enact a bill would equally be sufficient to waive, or to acquiesce in, constitutional defects in its passage. This "standing" doctrine is even stranger than the "equitable" discretion doctrine of the D.C. Circuit. But if the Government succeeds in securing the denial of review, its strange stand-

ing doctrine will never see the light of day, for it was clearly rejected by a majority of the court below and a suggestion for rehearing en banc was denied.

The Government's argument boils down to the proposition that the "equitable" discretion doctrine, which Respondents put forward in both lower courts, is an appellate species of harmless error. Such an argument assumes, as given, a matter that is not even before this Court—that the violation by the Congress of the Origination Clause is, one way or another, not a justiciable question. Taking it as established that the Origination Clause has indeed been violated, these petitioners should not, in the Government's view, be allowed to raise that claim in court. Nor, for all that appears, should anyone be allowed to raise it.

It is far too late in the day for the Government to claim that the House—or even the House, Senate and President together—could ignore with impunity (for that is precisely what non-justiciability means) an unambiguous constitutional directive concerning how the legislative process may be ordered. *See, Immigration and Naturalization Service v. Chadha*, ___ U.S. ___, 77 L.Ed. 2d 317 (1983); *Buckley v. Valeo*, 424 U.S. 1 (1976). Where would such a power come from if not from the Constitution itself? Can the Constitution require, and at the same time not require, that legislation be enacted according to a certain procedure? Such a self-contradictory proposition refutes itself.

The Government readily concedes that the D.C. Circuit's "equitable" or "remedial" discretion doctrine—the principal holding of the D.C. Circuit—is untenable. But it argues here, as it did in opposing certiorari in *Riegle v. Federal Open Market Committee*, that it is unnecessary for this Court to review the "remedial" discretion doctrine, because two (out of eleven) judges of the D.C. Circuit are on record

as opposing it, and that, left to its own devices, the D.C. Circuit may cure itself of its error without outside help. That was a forlorn hope in *Riegle*, as this very case proves. Only action by this Court will effect the cure which the Government concedes is necessary. It makes no sense to suggest, as the Government seems to, that a minority of two judges be treated as a majority of the Court of Appeals, and that the majority be treated as a wayward minority that will, like Mary's little lamb, find its way home in time. The "equitable" discretion doctrine grows stronger and more entrenched with each denial of certiorari. This Court may achieve the Government's stated objective by granting certiorari limited to the "equitable" or "remedial" discretion doctrine, which is all that Petitioners raised, summarily reversing the judgment below, and remanding for further proceedings.

Petitioners respectfully renew their prayer that their petition be granted.

Respectfully submitted,

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